◦ THE HON'BLE SRI JUSTICE BILAL NAZKI

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AND

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THE HON'BLE SRI JUSTICE C.V.RAMULU

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+ WP Nos. 11386 & 12328 of 2005

% Dated 17.02.2006

 # A.G.K. Associates and others

….Petitioners

Vs.

$ The State of Andhra Pradesh and others

….Respondents

! Counsel for petitioners: Mr. S.R.Ashok,

Mr. S. Chakrapani

^Counsel for Respondents: Mr. K. Raji Reddy,

<GIST:

> HEAD NOTE:

? Cases referred

1. (1983) 1 Supreme Court Cases 305;
2. 86 STC 105;
3. 45 STC 498;
4. 2003 (155) E.L.T. 209 (SC);
5. (1996) 3 Supreme Court Cases 709;
6. AIR 2000 SUPREME COURT 617;
7. 26 APSTJ 64;
8. 35 APSTJ 167;
9. 33 APSTJ 112;

HON'BLE Mr. JUSTICE BILAL NAZKI

AND

HON'BLE Mr. JUSTICE C.V.RAMULU

W.P.NOs. 11386 & 12328 of 2005

Dt. 17 .2.2006

Between:

A.G.K. Associates and others

…Petitioners

and

The State of Andhra Pradesh and others

…Respondents

HON'BLE Mr. JUSTICE BILAL NAZKI

AND

HON'BLE Mr. JUSTICE C.V.RAMULU

W.P.NOs. 11386 & 12328 of 2005

COMMON JUDGMENT: (Per Hon'ble Mr. Justice Bilal Nazki)

W.P.No. 11386 of 2005:

A short point is involved in this case. The petitioners have challenged an entry in Item No.58 of Schedule IV of the Andhra Pradesh Value Added Tax Act (hereinafter referred to as "the Act") as unconstitutional.

The petitioner No.2 is the partner of the 1st petitioner and he is aggrieved of the action of the State in taxing the skimmed milk powder and ultra high temperature milk (UHT milk) under Item No. 58 of the Schedule IV of the Act. It is contended that the Andhra Pradesh General Sales Tax Act, 1957 was repealed by the Andhra Pradesh Value Added Tax Ordinance, 2005 which was, later on, enacted as

Act No. 5/2005. Under APGST Act 6 of 1957 the Government, in exercise of its power under Section 9, issued notification in GO Ms. No. 1091 (Revenue), dt. 10.6.1957 exempting from tax the sales of fresh milk, curd and butter milk sold by dealers exclusively dealing in them and their products realized from surplus thereof. Another G.O.Ms.No. 20, dt. 20.1.1980 was issued granting exemptions in respect of sales of Pasteurized milk. The said notifications fell for interpretation in various decisions before the Sales Tax Appellate Tribunal as well as this Court. This Court, in *State of Andhra Pradesh Vs. Guntur District Milk Producers Co-Operative Unit Limited* (79 STC 211) held that since the milk cannot be preserved for a long period, it is converted into powder and sold as such and it is nothing but dehydrated form of pasteurized milk which is exempted under G.O.Ms.No. 20. Exemptions are provided under Section 7 of the Act. Schedule I of the Act contains 47 items of exempted goods. Item 16 of the said schedule exempts fresh milk and pasteurized milk other than UHT milk and skimmed milk powder from the purview of the Act. Item 58 of the schedule IV provides for levy of tax on skimmed milk powder and UHT milk @ 4%.

The grievance of the petitioners is that the skimmed milk powder and UHT milk are covered by item No. 16 of the Schedule I of the Act and as such the Item 58 of the Schedule IV of the Act which provides for levy of tax on skimmed milk powder and UHT milk is unconstitutional. The only question that falls for consideration before this Court is whether, in the light of entry in Item No. 16 of Schedule I of the Act which exempts fresh milk and pasteurized milk, the entry in Item No. 58 of Schedule IV of the Act was constitutional which levies tax on skimmed milk powder and UHT milk.

The learned counsel for the petitioners submits that it is a case of over classification and it is violative of Article 14 of the Constitution of India. He relies on a judgment of the Supreme Court reported in *D.S. Nakara and others Vs. Union of India* . This case, in our view, has no relevance. It was dealing with a case pertaining to the pensioners and the Court was examining as to whether the class of

pensioners was further divisible for the purpose of entitlement and payment of pension into those who retired by certain date and those who retired after that date. The Court held that the classification was too microscopic classification. The reasons for coming to this conclusion were given in the judgment itself. In paras 28 and 29 the Supreme Court made the following observations,

> "28. Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. However, as held in Douge V. Board of Education (302 US 74: 83 L Ed 57) a pension is closely akin to wages in that it consists of payment provided by an employer, is paid in consideration of past service and serves the purpose of helping the recipient meet the expenses of living. This appears to be the nearest to our approach to pension with the added qualification that it should ordinarily ensure freedom from undeserved want.
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> 29. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."

Another judgment on which reliance has been placed by the

learned counsel for the petitioners is the judgment of Gujarat High Court reported in *Chunilal Mayachand Vs. State of Gujarat* . The question with which we are concerned and was before the Gujarat high Court was whether “Milkmaid full-cream condensed milk” was not “milk, whole or separated or reconstituted” as appearing in entry 10 (i) of Schedule I to the Gujarat Sales Tax Act, 1969. The Sales Tax Authority had held that the two products were neither “milk, whole, separated or reconstituted” within the meaning of entry 10 (i) of Schedule I to the Act, but were “food-staff or food provisions” within the meaning of entry 6 of Schedule III to the Act. The Tribunal, however, held that “milk, whole, separated or reconstituted” would reasonably mean only three categories or varieties of milk, viz., whole milk, separated milk or reconstituted milk. The matter went to the Gujarat High Court. The Court held that the words “whole”, “separated” and “reconstituted” have been used in entry 10 out of abundant caution and not for the purpose of restricting the meaning of the word “milk” and the legislature has used the words to clarify that not only whole milk in its original liquid form but even separated milk and reconstituted milk were also covered by that entry which exempts tax.

In a judgment of the Madras High Court reported in *State of Tamil Nadu Vs. Indodan Milk Products* the assessee was dealing with condensed milk. The assessee contended before the assessing authority that the condensed milk was also milk and was eligible for exemption, as milk was exempted from sales tax. The assessing authority and the appellate authority rejected the claim of the assessee. The matter went to the Tribunal, the Tribunal held that the assessee was eligible for exemption. The High Court relied on a judgment of Allahabad High Court in *Indodan Milk Products Ltd. Vs. Commissioner of Sales Tax* (33 STC 381 (FB). The Allahabad High Court came to the conclusion that the condensed milk was nothing but milk in concentrated form which is obtained by evaporating water from milk in a fluid state and thereafter some sugar or preservative is added to it. The Court held that the condensed milk, as a matter of

fact, was milk and not product. The Madras High Court accepted the view of the Allahabad High Court and held that the condensed milk was milk. There was no separate entry for condensed milk.

In a judgment of the Supreme Court reported in *Collector of Central Excise Vs. Technoweld Industries* the question before the court was whether by drawing wire into a thinner gauge, manufacture had taken place. The further question was whether the wire of the thinner gauge was exigible to duty. The Supreme Court held in para-8,

> "We are unable to agree with the submission. It is to be seen that the initial product was a wire rod. The ultimately product is also a wire. All that is done is that the gauge of the rod is made thinner and the product is finished a little better. In our view the earlier decisions of the Tribunal are correct. There is no manufacture of a new product. Merely because there are two separate entries does not mean that the product becomes excisable. The product becomes excisable only if there is manufacture."

In our view, this judgment is not relevant for the purpose of present controversy because the Court was dealing with the question as to whether converting wire rods into a thinner gauge was a manufacturing process or not.

The contention raised by Mr. S.R. Ashok, learned senior counsel for the petitioners was that the skimmed milk powder and UHT milk are not milk products, but are milk, therefore they could not be made exigible to tax. This would have perhaps been accepted, had there been no specific entry with respect to skimmed milk powder and UHT milk. However, we are not concerned whether the skimmed milk powder and UHT milk are "milk" or "milk products" which had been the question before the Courts in the cases referred to above, but we are concerned with the question whether fresh milk and pasteurized milk and skimmed milk powder and UHT milk could be placed in two different schedules by the State. Therefore the judgments referred to by the learned counsel for the petitioners would

not be helpful in any way to come to a correct conclusion.

The learned counsel for the respondents has referred to a judgment of the Supreme Court reported in *State of A.P. Vs. McDowell & Co.* to submit that mere allegation of unreasonableness was not enough to strike down an enactment. He submits that the Supreme Court has held that the Act can be struck down only on two grounds viz., (1) lack of legislative competence or (2) violation of fundamental rights or any other constitutional provision. The Supreme Court, in this judgment, categorically stated that an enactment cannot be struck down on the plea that it was unreasonable, unnecessary or unwarranted.

In *State of U.P. Vs. Kamla Palace* classification made between cinemas receiving grant-in-aid and cinemas not receiving grant-in-aid was upheld by the Supreme Court.

The learned counsel for the respondents has also referred to a judgment of the Supreme Court reported in *TVL K.A.K.Anwar & Company Vs. State of Tamil Nadu* . In this case the question before the Supreme Court was whether raw hides and skins which are subjected to purchase tax under the Tamilnadu General Sales Tax Act could again be taxed as tanned hides and skins sold in the course of inter-State trade. The Supreme Court came to the conclusion that raw hides and skins and tanned hides and skins were two types of commodities.

In *Rekha Timber Depot & others Vs. DCTO, Prakasam District and others* this Court followed the judgment of the Supreme Court reported in *State of A.P. Vs. McDowell & Co.* (4th supra).

A similar question came before this Court in a case reported in Pallava Granites (India) Pvt. Ltd., Ongole and others Vs Commercial Tax Officer No.1, Ongole and others where the Court was considering two entries in the first schedule of the General Sales Tax Act, one entry pertaining to “raw granite stones” and other pertaining

to “polished granite stones”. This Court held that since raw granite stones and polished granite stones were shown under two different entries, they could be taxed differently.

The learned counsel for the petitioners has also placed before us the definition of milk. As we have already framed an opinion that the question before us is not whether skimmed milk powder and UHT milk is milk or not, the question is what is the effect of having two different entries for “fresh milk” and “pasteurized milk” and “skimmed milk powder” and “UHT milk”. Since there were judgments of this Court and other Courts that dehydrated milk was milk, the legislature, in its wisdom, thought it fit to place the milk and milk products under different categories and tax “skimmed milk powder” and “UHT milk” and not to tax “fresh milk” and “pasteurized milk”.

For these reasons, we do not find merit in this writ petition which is accordingly dismissed. No costs.

W.P.No. 12328 of 2005:

It is submitted that this case does not pertain to the controversy involved in the above case. Therefore this case be listed separately for hearing.

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17.2.2006

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